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# A Break in the Cycle: Applying ADR Principles to Inner–Prison Conflicts

Eli Dodge\*

## I. INTRODUCTION

Prison conflicts, and their subsequent resolution, are often inaccurately portrayed in American cinema. Mainstream American movies have become increasingly more violent over the past fifty years.<sup>1</sup> The increased violence in cinema, in a way, reflects the conditions of American culture and society.<sup>2</sup> The United States has the twenty–eighth highest rate of deaths from gun violence in the world,<sup>3</sup> and it is the world’s leader in incarceration.<sup>4</sup> Nevertheless, the way in which violence in American movies is portrayed—as a necessary or appropriate solution to any problem<sup>5</sup>—may be influencing viewers to believe such violence is an accurate representation of societal conflict resolution.<sup>6</sup> The portrayal of violence as the end–all–be–all solution, irrespective of the collateral consequences, is evident in cinema’s depiction of the U.S. criminal justice system.<sup>7</sup> Particularly, sensationalized violence has become a common theme in recent prison films.<sup>8</sup> In movies, the prisoner is often a stereotypically violent individual,<sup>9</sup> and prison is portrayed as a cruel and dangerous world.<sup>10</sup>

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1. See Patrick M. Markey, Juliana E. French, & Charlotte N. Markey, *Violent Movies and Severe Acts of Violence: Sensationalism Versus Science*, 41 HUM. COMM. RES. 155 (2015).

2. See Amy C. Hall, *The Effect of Contemporary Cinema on American Society* (2002) (unpublished Senior Integration Paper, Covenant College).

3. Nurith Aizenman & Marc Silver, *How the U.S. Compares With Other Countries in Deaths From Gun Violence*, NPR (Aug. 5, 2019), <https://www.npr.org/sections/goatsandsoda/2019/08/05/743579605/how-the-u-s-compares-to-other-countries-in-deaths-from-gun-violence>.

4. *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Mar. 1, 2020).

5. Hall, *supra* note 2.

6. *Id.*

7. See Jamie Bennett, *The Good, the Bad and the Ugly: The Media in Prison Films*, 45 HOW. J. CRIM. JUST. 97, 106 (2006).

8. *Id.* at 97.

9. *Id.* at 112.

10. See Jan Ven den Bulck & Heidi Vandebosch, *When the Viewer Goes to Prison: Learning Fact from Watching Fiction. A Qualitative Cultivation Study*, 31 POETICS J. OF EMPIRICAL RES. ON CULTURE: THE MEDIA & THE ARTS 103 (2003); see generally Benjamin S. Boyce, *The Spectacle of Punishment: Cinematic Representations of the Prison–Industrial Complex* (Nov. 14, 2013) (unpublished M.A. Thesis, University of Colorado); BIG STAN (Crystal Sky Pictures 2007).

Although prison conflicts do not actually occur in the embellished way they are depicted,<sup>11</sup> violence remains a significant issue in prison.<sup>12</sup> The conflict resolution systems currently in place to address this violence are inadequate and create a cyclical problem.<sup>13</sup> The failure of existing conflict resolution systems to address the underlying causes of prison conflicts exacerbates the negative impacts of those conflicts.<sup>14</sup> There is no doubt that reforms are needed in order to break this cycle. This Comment argues that prisons should replace inadequate resolution systems with mediation– and arbitration–centered conflict programs to reduce the frequency and severity of prison conflicts.

Section II of this Comment discusses the problem of inmate–on–inmate violence, the significant impacts of these conflicts, and the most widely used conflict resolution systems currently in place. Next, Section III provides an overview of the most well–known alternative dispute resolution (“ADR”) systems used outside of prison in the criminal context: victim–offender mediation, restorative justice peacemaking circles, and arbitration. Section IV then applies these ADR principles to the status–quo of inner–prison conflicts and conflict resolution systems addressed in Section II. Section IV proposes what these new ADR–centered, inner–prison conflict resolution systems might look like and outlines their possible advantages. Finally, Section V concludes by arguing for the application of ADR principles to better prevent and resolve inner–prison conflicts.

## II. INNER–PRISON CONFLICTS AND CONFLICT RESOLUTION SYSTEMS

With approximately 2.2 million people currently held in prisons and jails, the United States leads the world in incarceration and has the world’s highest incarceration rate of 655 per 100,000 people.<sup>15</sup> This mass incarceration problem, largely spurred by “tough on crime” policies from the 1980–90’s,<sup>16</sup> is evidenced by the 500 percent increase in America’s prison population over the last forty years.<sup>17</sup> The increased prison population has, in turn, led to unprecedented prison overcrowding,<sup>18</sup> which itself has been a significant factor contributing to inner–prison violence.<sup>19</sup> Additional factors such as ineffective discipline, poor facility design, and the absence of autonomy amongst prisoners have compounded the

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11. Boyce, *supra* note 10, at 10.

12. *See infra* Section II.

13. *See infra* Section II(C).

14. *See id.*

15. *Trends in U.S. Corrections*, THE SENTENCING PROJECT 2 (June 22, 2018), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

16. *Id.*; *see also* *Criminal Justice Reform*, EQUAL JUSTICE INITIATIVE, <https://eji.org/mass-incarceration> (last visited May. 12, 2020).

17. *Trends in U.S. Corrections*, *supra* note 15.

18. *Criminal Justice Reform*, *supra* note 16.

19. *See* John. J. Gibbons & Nicholas deBelleville Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J. L. & POL’Y 385 (2006); *see also* Rebecca Trammell, Abby Vandenberg, & Timbre Ludden, *Mutual Respect, Conflict & Conflict Resolution in Prison: A Response to the Commission on Safety & Abuse in America’s Prison Report*, NEB. DEPT. OF CORR. SERVS. (Feb. 2012), [https://www.corrections.nebraska.gov/sites/default/files/files/46/trammell\\_2012\\_1.pdf](https://www.corrections.nebraska.gov/sites/default/files/files/46/trammell_2012_1.pdf); KRISTINE LEVAN, *PRISON VIOLENCE: CAUSES, CONSEQUENCES, AND SOLUTIONS* (2007).

overcrowding issue.<sup>20</sup> Consequently, these factors, paired with the inadequacy of the applied conflict resolution methods,<sup>21</sup> have fed the perception of prisons as the “violent environments”<sup>22</sup> often portrayed in American pop culture and cinema.<sup>23</sup> Realistically, American prisons are high-stress settings that trigger a “fight-or-flight” response in inmates and worsen inmate behavior.<sup>24</sup> Inmates must learn to prepare for or avoid prison fights and possible victimization,<sup>25</sup> such as inmate-on-inmate assault.<sup>26</sup>

### A. Physical Violence

Violence in prisons, regardless of the accuracy of cinematic portrayals,<sup>27</sup> presents real problems for incarcerated individuals. Prison incidents range from verbal altercations and minor physical fights between inmates<sup>28</sup> to more serious offenses, such as assault with a weapon<sup>29</sup> and sexual assault.<sup>30</sup> At the foundation of these conflicts lie inmates’ grasps for power and conditioned responses to settling disputes “in the way they are accustomed to—through violence.”<sup>31</sup> Thus, while the implementation of ADR principles to help resolve inner-prison conflicts may not be applicable in every situation,<sup>32</sup> addressing the underlying cause of violence is an important first step toward mitigating wide-spread disputes between inmates and the negative impacts of prison violence.<sup>33</sup>

Violence in prisons is both extensive and underreported. In 2000, over 34,000 inmate-on-inmate assaults were reported across state and federal correctional facilities.<sup>34</sup> Note that the number—34,000—denotes assaults that are *known*. Much like the majority of sexual assaults that occur outside of prison not being reported,<sup>35</sup> a large amount of violence within prisons goes undetected or unreported as well.<sup>36</sup> Prisoners may be apprehensive to inform, or “snitch,” on other prisoners, especially if the conflict resolution system will not address the problem. “Snitching” may

20. Gibbons & Katzenbach, *supra* note 19, at 416.

21. Laurel Kaufer, Douglas E. Noll, & Jessica Mayer, *Prisoner Facilitated Mediation: Bringing Peace to Prisons and Communities*, 16 CARDOZO J. CONFLICT RESOL. 187, 195 (2014).

22. Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. OF CORRECTIONAL HEALTH CARE 58, 58–82 (2009).

23. See *supra* Section I.

24. Wolff & Shi, *supra* note 22.

25. *Id.*

26. See *infra* Section II(A).

27. See *supra* Section I.

28. Trammell, Vandenberg, & Ludden, *supra* note 19, at 46.

29. See generally Eduardo Cuevas, *Four Inmates Stabbed During Riot at California’s Salinas Valley State Prison*, THE CALIFORNIAN (July 9, 2019, 5:52 PM), <https://www.thecalifornian.com/story/news/2019/07/09/stabbed-california-prison-riot-salinas-valley-state-prison-incarceration-stabbing-inmates/1689381001/>.

30. See Allen J. Beck, Ramona R. Rantala, & Jessica Rexroat, *Sexual Victimization Reported by Adult Correctional Authorities, 2009–11*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Jan. 2014), <https://www.bjs.gov/content/pub/pdf/svraca0911.pdf>.

31. William J. Morgan, Jr., *The Major Causes of Institutional Violence*, 23(5) AM. JAILS 65 (2009).

32. See *infra* Section III.

33. See *infra* Section II.

34. See Kaufer, Noll, & Mayer, *supra* note 21; see also Gibbons & Katzenbach, *supra* note 19.

35. See *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Mar. 2, 2020) (“Only 230 out of every 1,000 sexual assaults are reported to police. That means about 3 out of 4 go unreported.”).

36. Levan, *supra* note 19; see also Kaufer, Noll, & Mayer, *supra* note 21.

even worsen the conflict,<sup>37</sup> or extend the conflict to additional parties. In 2000, the unofficial total of inmate-on-inmate assaults was estimated to be closer to 300,000 across state and federal correctional facilities, well in excess of the 34,000 reported incidents.<sup>38</sup> Seven years later, a study of self-reported data from male inmates across thirteen prisons found twenty-one percent of inmates “reported experiencing an incident of physical victimization by another inmate over the course of a six month period.”<sup>39</sup> The data available does not accurately demonstrate the true scope of the physical victimization inmates face because of barriers to reporting, collecting, and distributing information.<sup>40</sup> The only thing truly “known” is that the violence inmates face in prison is extensive and damaging.

### *B. Impacts of Inner Prison Conflicts*

The negative impact on victims of inmate-on-inmate violence is substantial. Aside from the obvious physical and emotional wounds associated with being a victim of violence, the “violent environment” of many prisons increases aggressive behavior among inmates who feel the need to “look tough” in a hostile setting.<sup>41</sup> In turn, continued aggressive behavior, perpetrated for “self-preservation” purposes,<sup>42</sup> has long-term psychological effects on inmates<sup>43</sup> and can lead to poor post-release adjustment such as “elevated levels of antisocial behavior and emotional distress.”<sup>44</sup> In other words, former inmates generally experience difficulties attempting to reintegrate into the community, which is completely unlike the traumatizing environment they just left. Prison violence not only increases recidivism rates, it can lead to secondary victimization when family members of former inmates must engage with a more aggressive loved one.<sup>45</sup> Ultimately, the system fails its rehabilitative and deterrent goals<sup>46</sup> when inmates are exposed to violence by other inmates.

### *C. Inner-Prison Conflict Resolution*

Unfortunately, the inadequacy of the conflict resolution methods employed in these “violent environments” exacerbates the negative physical, emotional, and psychological effects of prison conflict on inmates. Common conflict resolution techniques used in prison involve segregating inmates, taking away privileges, and, when necessary, placing inmates in solitary confinement.<sup>47</sup> These punishments,

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37. Levan, *supra* note 19; see also Kaufer, Noll, & Mayer, *supra* note 21.

38. Kaufer, Noll, & Mayer, *supra* note 21, at 189–90.

39. *Id.* at 190; see also Wolff & Shi, *supra* note 22.

40. Gibbons & Katzenbach, *supra* note 19, at 525.

41. Kaufer, Noll, & Mayer, *supra* note 21, at 190 (citing Richard McCorkle, *Personal Precautions to Violence in Prison*, 19 CRIM. JUST. & BEHAV. 160, 161 (1992)).

42. *Id.*

43. *Id.*

44. *Id.*

45. Levan, *supra* note 19, at 2.

46. Kaufer, Noll, & Mayer, *supra* note 21, at 191.

47. *Id.*

along with others imposed at the discretion of the prison staff, can be levied against an inmate for a crime or violation of a prison rule.<sup>48</sup>

While disciplinary punishments usually have to be doled out in accordance with certain state and federal procedure guidelines,<sup>49</sup> inmates can challenge them with a Due Process claim if they suffer from “atypical and significant hardship.”<sup>50</sup> Nonetheless, courts generally give prison officials great deference and uphold their disciplinary decisions.<sup>51</sup> Given this lack of judicial oversight, prisoners are often forced into conflict resolution systems that do not address the actual causes of inmate violence.<sup>52</sup> Instead, current conflict resolution methods create a cyclical problem where the inmate, already exposed to the negative impacts of prison violence,<sup>53</sup> is not put in a position to effectively address or avoid future conflicts.<sup>54</sup>

Current methods of conflict resolution are temporary, centered on conflict avoidance instead of resolution, and do not teach inmates how to peacefully interact with those who are different than them.<sup>55</sup> Segregating inmates, for example, is often a de facto means of racial segregation and, therefore, reinforces the cycle.<sup>56</sup> Solitary confinement and loss of privileges, such as prohibiting visitors or outside communication, have been linked to increased risk of suicide and mental illness.<sup>57</sup> Ultimately, faulty systems lead to post-release behavioral issues that again fail to achieve the system’s long-term rehabilitative and deterrent purposes and continue the cycle of violence.

Overcrowded prisons have compounded the problem of inner-prison conflicts between inmates.<sup>58</sup> Individually, inmates suffer both physical and emotional damage that causes them to become more aggressive.<sup>59</sup> Secondarily, the inmate’s family and community may have difficulties dealing with an individual struggling to reintegrate post incarceration.<sup>60</sup> Finally, the system itself fails to meet its goals of rehabilitation and deterrence if individuals reoffend and return to prison, an environment aptly nicknamed a “lifelong home with a revolving door.”<sup>61</sup> Again, traditional conflict resolution systems applied in the prison context continue to reinforce the cycle of violence. Thus, it is time for prison officials to consider implementing innovative alternative dispute resolution principles already taking root outside of the prison walls.

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48. MIRANDA BERGE, YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS, JAILHOUSE LAWYER’S MANUAL 543 n.5 (2017) (referencing *Sandin v. Connor*, 515 U.S. 472, 484 (1995), where the Court held “that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life.”).

49. *Id.* at 542.

50. *Id.*

51. *Id.* at 561.

52. Kaufer, Noll, & Mayer, *supra* note 21, at 191.

53. *See supra* Section II(B).

54. Kaufer, Noll, & Mayer, *supra* note 21, at 191.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* Section II.

59. *See supra* Section II(A).

60. *See supra* Section II(B).

61. *See id.*

### III. ADR PRINCIPLES: MEDIATION AND ARBITRATION

Alternative dispute resolution (“ADR”) is a means of settling disputes outside of the courtroom, sans litigation.<sup>62</sup> ADR includes processes such as negotiation, conciliation, early neutral evaluation, mediation, and arbitration.<sup>63</sup> Recently, the United States legal field has seen a significant development of ADR principles,<sup>64</sup> which has led to a shift away from America’s traditional adversarial system.<sup>65</sup> The two major forms of ADR, mediation and arbitration,<sup>66</sup> have been heavily discussed and applied across a wide range of practice areas. In the criminal context, application of mediation processes resulted in the creation of a new conflict resolution principle known as restorative justice.<sup>67</sup> Specifically, restorative justice has manifested in the form of victim–offender mediation<sup>68</sup> and community peacemaking circles.<sup>69</sup>

#### A. Mediation

Mediation is the most well-known ADR method, and it is considered a consensual process on the conflict resolution continuum.<sup>70</sup> Mediation refers to the process in which a third party neutral, known as the mediator, assists the parties in resolving their dispute.<sup>71</sup> In traditional mediation, the mediator does not impose a solution on the parties.<sup>72</sup> Instead, the mediation is a “facilitative” process where the parties attempt to reach a result that is uniquely suited to their needs.<sup>73</sup> If the parties do manage to reach a solution, they may choose to articulate their agreement in an enforceable contract.<sup>74</sup> Under certain circumstances, however, if the parties request that the mediator serve as an “evaluator,” the mediator may give advice, propose possible solutions, guide the parties towards a particular outcome, or give an opinion on the most likely result of a potential trial should the parties not reach settlement.<sup>75</sup>

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62. Tala Esmaili & Krystyna Gilkis, *Alternative Dispute Resolution*, LEGAL INFO. INST. (June 18, 2017), [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution).

63. *Id.*

64. See generally LEONARD L. RISKIN ET AL., *OVERVIEW OF DISPUTE RESOLUTION & LAWYERS* 881 (5th ed. 2014).

65. See Gail M. Valentine–Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JUR. TRIALS 555, § 1 (1995).

66. Esmaili & Gilkis, *supra* note 62.

67. Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1514 (1994).

68. *Id.* at 1483.

69. Meredith C. Doyle, *Circles of Trust: Using Restorative Justice to Repair Organizations Marred by Sex Abuse*, 14 PEPP. DISP. RESOL. L. J. 175, 188 (2014).

70. RISKIN ET AL., *supra* note 65, at 15.

71. 18 TIMOTHY J. TRYNIECKI, *MISSOURI PRACTICE, REAL ESTATE LAW—TRANSACTIONS AND DISPUTES* § 45:1 (3d ed. 2019).

72. RISKIN ET AL., *supra* note 65, at 15.

73. *Id.*

74. *Id.*

75. Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be A Wise One*, 59 ALA. LAW. 246, 246 (1998).



Mediation, at its core, has three key characteristics.<sup>76</sup> First, each party must grant a representative permission to settle the dispute on his or her behalf.<sup>77</sup> Second, each party must demonstrate a commitment to the process by devoting the necessary time and attention to “allow the mediation to work.”<sup>78</sup> Lastly, each party must agree to make a good faith effort to settle the dispute through the mediation.<sup>79</sup>

The advantages and disadvantages of mediation vary depending on the parties’ situation<sup>80</sup> and on other variables such as timing, leverage, relative bargaining power, or even luck.<sup>81</sup> General advantages of mediation are: it is relatively inexpensive, quick,<sup>82</sup> informal,<sup>83</sup> and flexible<sup>84</sup> compared to litigation; mediation encourages the parties to look at the conflict from different viewpoints;<sup>85</sup> and it tends to promote problem–solving and relationship–maintenance.<sup>86</sup> Furthermore, mediations are confidential<sup>87</sup> and usually a consensual process, although some jurisdictions now mandate mediation between parties to certain disputes.<sup>88</sup> Yet, mediation is not without its disadvantages. For example, if the mediation is not a success, it wastes time and money<sup>89</sup> and may allow one party to gain an advantage by learning details about the other’s case.<sup>90</sup> Engaging in mediation may be perceived as weakness<sup>91</sup> or expose a power imbalance,<sup>92</sup> creating an atmosphere where one party may improvidently settle.<sup>93</sup> Lastly, a mediation essentially deprives the court of its ability to interpret law and create precedent.<sup>94</sup>

In spite of the disadvantages that exist throughout mediation’s various forms, mediation is still regarded as a way to help parties reach more satisfying resolutions through perceived “win–win” outcomes.<sup>95</sup> Overall, its strength is evident in its ability to transform relationships, foster communication, and promote social justice.<sup>96</sup> Mediation’s effectiveness and potential have led to its introduction into the field of criminal law.

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76. TRYNIECKI, *supra* note 73, at § 43:3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See generally* Valentine–Rutledge, *supra* note 66, at § 3.

81. TRYNIECKI, *supra* note 73, at § 45:2.

82. *Id.*

83. Valentine–Rutledge, *supra* note 66, at § 3.

84. *Id.*

85. *See id.*

86. *Id.* at § 8.

87. *Id.* at § 5.

88. *Id.* at §§ 5, 20.

89. TRYNIECKI, *supra* note 73, at § 45:2 (for example, a party can use information learned in a failed mediation as leverage in subsequent litigation).

90. *Id.*

91. Valentine–Rutledge, *supra* note 66, at § 6.

92. RISKIN ET AL., *supra* note 65, at 22.

93. TRYNIECKI, *supra* note 73, at § 45:5.

94. RISKIN ET AL., *supra* note 65, at 24.

95. Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1170 (1997).

96. *Id.*



*1. Criminal Context: Restorative Justice*

“Restorative justice” is the result of mediation’s application to the realm of criminal justice.<sup>97</sup> It focuses on rehabilitation by trying to create solutions that promote reconciliation between offenders and victims, or between offenders and the community.<sup>98</sup> The restorative justice system recognizes that crime involves injury to both victims and the community at large,<sup>99</sup> but it places primary emphasis on the wrong done to the *person*, as opposed to the potential wrong done to the state.<sup>100</sup> Effective restorative justice models also address community concerns and the needs of the offender by promoting “community security by providing an effective deterrence to crime.”<sup>101</sup> Criminal actions are a unique type of conflict between parties that necessitate resolution but cannot be adequately resolved through traditional criminal conflict resolution systems.<sup>102</sup> Restorative justice provides a framework for how conflicts between offenders and victims *can* be adequately resolved, and it has taken several forms, two of which—victim–offender mediation<sup>103</sup> and community peacemaking circles<sup>104</sup>—are examined below.

Victim–offender mediation (“VOM”) is a process that allows victims and offenders to meet face–to–face,<sup>105</sup> along with a trained mediator, and engage in a discussion of the offense with the hope of reaching a mutually agreeable resolution.<sup>106</sup> Although VOM varies by jurisdiction, the shared driving force behind all VOM programs is the “desire to meet the needs of both victims and offenders of crime.”<sup>107</sup> VOM programs generally operate in the context of criminal justice systems rather than in civil court,<sup>108</sup> and they focus on the need for reconciliation of the underlying conflict between the parties instead of a quick–fix solution.<sup>109</sup>

VOM programs have grown in popularity recently, and such programs are now well–established in both large metropolitan areas and small rural towns.<sup>110</sup> The “failure of the [U.S.] corrections system,” as evidenced by “the overburdening of courts, the rising incarceration rate, the high recidivism rate, and the high cost of housing inmates,” has contributed to the VOM movement.<sup>111</sup> In other words, the growth and expansion of VOM programming was prompted by a strong desire to reform the current state of affairs in the American criminal justice system.<sup>112</sup> Given that VOM programs developed out of the criminal justice reform movement, introducing VOM into correctional facilities to resolve inner–prison conflicts could help advance reformatory and rehabilitative goals.

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97. Bakker, *supra* note 68, at 1514.

98. *Id.* at 1515.

99. *Id.*

100. *Id.*

101. *Id.* at 1516.

102. *Id.* (“[T]raditional criminal conflict resolution systems” refers to incarceration, probation, fines, and other types of punishment brought forth through the criminal justice system).

103. Bakker, *supra* note 68, at 1484.

104. Doyle, *supra* note 70, at 177.

105. Bakker, *supra* note 68, at 1484.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1485.

111. Bakker, *supra* note 68, at 1492.

112. *Id.*

Community peacemaking circles are similar to VOM, but unlike VOM programs, peacemaking circles always include those in the community that may have a stake in the reconciliation process.<sup>113</sup> Community peacemaking circles, which are often used to help restore trust lost between offending organizations and their affected members, emphasize *first* building relationships, *then* creating a plan of action. In pursuit of the same goals as other restorative justice approaches,<sup>114</sup> community peacemaking circles gather information about the causes of harm, the parties involved, and the role the greater community can play in helping the offender resolve and make amends for the harm they caused.<sup>115</sup> While the specifics of peacemaking circles differ based on a variety of factors, all peacemaking community circles generally share five main features: established guidelines, ~~talking~~ engaged conversation, a facilitator, a search for consensus, and a ceremony.<sup>116</sup> As with VOM programs, using peacemaking circles to resolve conflicts within *prison* communities may play an important role in furthering the criminal justice reform movement.

### B. Arbitration

Arbitration is characteristically known as a “binding process” in which a third-party neutral decides the merits of the dispute based on evidence that has been presented to them.<sup>117</sup> Arbitration is more similar to litigation than most other types of ADR,<sup>118</sup> as it falls closer to the “adjudicatory process” side of the resolution continuum.<sup>119</sup> Although the rules of evidence do not apply during arbitration hearings as they would in a trial,<sup>120</sup> arbitration still features many litigation principles, such as discovery.<sup>121</sup>

The key feature of arbitration is the same as most other ADR principles: consent.<sup>122</sup> Unlike mediation, however, where the parties typically consent to both the process and the solution, individuals engaged in arbitration only consent to the process; a third-party, the arbitrator, imposes the solution.<sup>123</sup> Consent can be implied and is often memorialized through a contractual arbitration clause.<sup>124</sup>

As with mediation, the advantages and disadvantages of arbitration vary depending on the needs of the parties. Arbitration is usually faster and more cost-effective than litigation.<sup>125</sup> Arbitration allows the parties to select their forum and their arbitrator, leading to a decision from an intermediary that is an expert in a particular field.<sup>126</sup> Additionally, arbitration is a confidential process, which means

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113. Doyle, *supra* note 70, at 177.

114. *Id.*

115. *Id.* at 189.

116. *Id.*

117. TRYNIECKI, *supra* note 73, at § 43:2.

118. *Id.*

119. RISKIN ET AL., *supra* note 65, at 41.

120. TRYNIECKI, *supra* note 73.

121. *Id.*

122. *Id.* at § 44:1.

123. *Id.* at § 43:2.

124. *Id.*

125. Sal Diaz, *The Cost of Arbitration*, CORNELL INT’L ARB. SOC’Y (Feb. 5, 2019), [https://cornellias.ome.blog/2019/02/05/the-cost-of-arbitration/#\\_ftnref1](https://cornellias.ome.blog/2019/02/05/the-cost-of-arbitration/#_ftnref1).

126. *Id.*

the privacy of the parties is kept intact through the avoidance of media attention that often accompanies public litigation.<sup>127</sup> Arbitration also has some notable disadvantages: the lack of available appeals (unless the decision was reached through illegal means or the arbitrator exceeded their authority);<sup>128</sup> the parties often determine many of the discovery parameters, which can hinder the arbitrator and parties from gathering all the information they need to resolve the dispute;<sup>129</sup> and arbitration's confidentiality results in a lack of legal precedent, sometimes making arbitration awards sporadic and unpredictable.<sup>130</sup>

Despite these well-researched and notable advantages and disadvantages, arbitration is not applied in the criminal context as much as mediation and its restorative justice forms.<sup>131</sup> Its current underutilization, however, does not mean that an arbitration model for criminal justice is impossible or even impractical. In fact, the underlying theories of arbitration have already been applied in the criminal justice systems of cities such as Columbus, Ohio and Tucson, Arizona.<sup>132</sup> In the prison context, where prison officials are given wide discretion on the type of conflict resolution systems employed,<sup>133</sup> the underlying theories of arbitration should be even easier to implement because of arbitration's more authoritative and formalized structure.<sup>134</sup>

### C. Movement Towards ADR Principles

Conflict resolution in the United States traditionally happens through the adversarial system.<sup>135</sup> This adversarial system, at least for legal issues that arise outside of prison, typically results in the filing of a lawsuit or criminal charges.<sup>136</sup> When a conflict arises, its probable resolution may be seen as falling on a continuum based on who will resolve the conflict.<sup>137</sup> The two opposing ends of this continuum are "consensual" and "adjudicatory" processes, with other conflict resolution processes falling somewhere in between the extremes.<sup>138</sup> Consensual processes are those in which the parties resolve the dispute themselves,<sup>139</sup> while adjudicatory processes involve a third-party "enforcer"—such as an arbitrator or a judge—listening to the parties and ultimately deciding how to resolve the dispute.<sup>140</sup> The most common adjudicatory processes, court and administrative adjudication, allow third-party enforcers to impose a solution upon the parties without their consent.<sup>141</sup>

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127. *Id.*

128. *Id.*

129. *Id.*; Kevin Mason, *Will Discovery Kill Arbitration?*, 2020 J. DISP. RESOL. 207 (2020).

130. *Id.*

131. Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 ARB. INT'L 95, 97 (2006).

132. See generally John M. Greacen, *Arbitration: A Tool For Criminal Cases?*, 2 BARRISTER 10 (1975).

133. BERGE, *supra* note 48, at 542.

134. TRYNIECKI, *supra* note 73.

135. *History of Alternative Dispute Resolution*, TEXAS METHODS OF PRACTICE § 76:2 (2019).

136. *Id.*

137. RISKIN ET AL., *supra* note 65, at 12.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 14.

The main form of conflict resolution in the highly adversarial U.S. legal system is litigation.<sup>142</sup> In 2006, state courts reported 102.4 million newly filed or reopened criminal and civil cases.<sup>143</sup> Despite the sheer number of cases, the proportion of cases resolved through the courts has decreased significantly since the second half of the Twentieth Century.<sup>144</sup> This “vanishing trial” phenomenon,<sup>145</sup> coupled with an increased application of ADR across America,<sup>146</sup> has shifted America’s adversarial system, placing more emphasis on utilizing ADR principles and consensual or conciliatory processes.<sup>147</sup>

Between 1980 and 1993, institutionalized ADR programs in the U.S. saw a 300 percent increase at state and local levels.<sup>148</sup> Today, in an effort to reduce costs and delays associated with traditional litigation, some jurisdictions mandate ADR between the parties,<sup>149</sup> while others provide for court-ordered ADR upon motion by a party.<sup>150</sup> If conflict resolution systems outside of prison are placing a heavier emphasis on ADR principles,<sup>151</sup> shouldn’t inmate-to-inmate conflict resolution systems *within prison* mirror that trend? The next Section explores this possibility.

#### IV. APPLYING MEDIATION AND ARBITRATION TO INNER-PRISON CONFLICTS

Given the general criminal justice system’s gradual move towards ADR,<sup>152</sup> as well as the extensive problems created by prison conflicts and their inadequate resolution methods,<sup>153</sup> inner-prison systems should use mediation and arbitration to combat the violent means inmates use to settle disputes.<sup>154</sup> Reducing “self-help” methods of conflict resolution is the first step towards mitigating wide-spread inmate-on-inmate conflicts and the associated aftermath. New ADR-centered, inner-prison systems could take any number of forms based on the specific circumstances but, at a foundational level, should maintain the same underlying themes of community, reconciliation, and restitution rather than punishment.

##### *A. Inmate-to-Inmate Mediation*

Given that mediation has become increasingly popular in the criminal justice system,<sup>155</sup> inner-prison conflict resolution systems stand to benefit from this well-mined field. Mediation has the ability to promote problem-solving and

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142. *State Court Caseload Statistics*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=30> (last visited Mar. 2, 2020).

143. *Id.*

144. RISKIN ET AL., *supra* note 65, at 41.

145. *Id.* at 8.

146. Valentine-Rutledge, *supra* note 66.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See supra* Section III(C).

153. *See supra* Section II.

154. *See supra* Section III.

155. Bakker, *supra* note 68, at 1480.

relationship—maintenance above all else.<sup>156</sup> Moreover, mediation encourages the parties to look at the conflict from different viewpoints.<sup>157</sup> These characteristics are drastically different than those of traditional prison conflict resolution systems, which fail to address the main cause of the conflict by segregating or disciplining prisoners.<sup>158</sup> The unique principles of mediation can reduce the counterproductivity of traditional inner-prison conflict resolution by teaching inmates to peacefully address the underlying cause of the conflict head-on.<sup>159</sup> In fact, some organizations have already begun this process by showing prisoners the value of mediation and by training them to become mediators themselves.<sup>160</sup> For now, these new conflict resolution systems should take two similar, yet distinct forms: prisoner-facilitated victim-offender mediation and prison peacemaking circles.

### *1. Prisoner-Facilitated Victim-Offender Mediation*

Like traditional victim-offender mediation,<sup>161</sup> prison-based VOM should include a consensual, face-to-face meeting between the two individuals involved in the conflict and a trained mediator to facilitate the process.<sup>162</sup> Additionally, prison VOM should be offered to inmates before any other action to ensure that is, in fact, consensual before it can take place.<sup>163</sup> Similarly, prison VOM should focus on reconciliation, as well as a mutual understanding of the imprisonment experience the parties share.<sup>164</sup> Although most VOM systems are more “dialogue driven” than “settlement driven,”<sup>165</sup> inner-prison VOM should place an equal emphasis on dialogue and settlement. An emphasis on dialogue should allow inmates to realize its rehabilitative value and produce an agreement that lends structure and legitimacy to the process.

In this unique inmate-to-inmate conflict resolution system, the mediator should themselves be a current or former prisoner.<sup>166</sup> In “prisoner-facilitated mediation,” as it is called, select inmates are given training in communication skills, mediation, and other conflict resolution processes.<sup>167</sup> The theory behind prisoner-facilitated mediation is that participants are more likely to trust and work with someone with whom they can relate.<sup>168</sup> Not only are inmates more likely to participate with a “safe” mediator,<sup>169</sup> but the inmate-mediator has a better understanding of the complex nature of the prison setting and the violent means

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156. TRYNIECKI, *supra* note 73, at § 45:2.

157. *Id.*

158. Kaufer, Noll, & Mayer, *supra* note 21, at 191.

159. *Id.*

160. See generally Mieke H. Bomann, *Prison Tensions Cool When Inmates Seek Training as Mediators*, MEDIATE.COM, <https://www.mediate.com/articles/prison.cfm> (last visited Mar. 2, 2020).

161. Bakker, *supra* note 68.

162. *Id.* at 1480.

163. *Id.* at 1484.

164. *Id.* at 1483.

165. See Mark S. Umbreit, Robert B. Coates, & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION J. 29, 29–30 (Dec. 2001).

166. Kaufer, Noll, & Mayer, *supra* note 21, at 187–88.

167. *Id.*

168. *Id.* at 194.

169. *Id.* at 195.

inmates often employ to settle disputes.<sup>170</sup> Insider knowledge will help the mediator facilitate a solution that is feasible in the prison setting.<sup>171</sup> Alternatively, this model could feature a panel of mediators that includes at least one current or former prisoner and a neutral third-party.

Prisoner-facilitated VOM has many potential benefits. First, it retains the individual-level benefits of reconciliation but replaces existing counterproductive conflict resolution practices. Second, prisoner-facilitated VOM benefits inmate mediators by teaching them conflict resolution skills that mitigate the harms<sup>172</sup> associated with living in the “violent environment” of prison.<sup>173</sup> Lastly, using members of the current prison population as mediators can benefit the overall prison population through spill-over effects.<sup>174</sup> If inmates see the successful outcomes of prisoner-facilitated VOM, more inmates will begin to see the value in non-violent conflict resolution.<sup>175</sup> Mediators’ knowledge of anti-aggressive conflict resolution techniques can potentially reduce the number of aggression-first individuals in the community and replace them with inmates who may even intervene before conflicts turn violent.<sup>176</sup> Other inmates will essentially reap the benefits of mediation without having participated in a mediation or mediation training themselves.

While prisoner-facilitated VOM may not be applicable to every situation, such as sexual assault cases, particularly violent crimes, or conflicts between prisoners and prison staff, its benefits can significantly reduce the negative impacts of inner-prison conflict and traditional conflict resolution practices.<sup>177</sup>

## 2. Prison Peacemaking Circles

Prisons should offer the option of consensual prisoner peacemaking circles, alongside prisoner-facilitated VOM, as a primary alternative to traditional conflict resolution. While the specifics of the peacemaking circle will vary depending on a variety of factors, prison peacemaking circles should maintain the five main features of outside community peacemaking circles: established guidelines, engaged conversation, an inmate-facilitator, a search for consensus, and a ceremony.<sup>178</sup> Just as the community is allowed to have a stake in the meditative process in outside peacemaking circles,<sup>179</sup> prison peacemaking circles should involve the offenders, an inmate-mediator, and other inmates.

Prison peacemaking circles should provide many of the same benefits as prisoner-facilitated VOM,<sup>180</sup> so long as the process emphasizes building relationships between the inmate parties and the greater prison community.<sup>181</sup> Prison peacemaking circles will let other inmates who are external to a particular conflict see the value of non-aggressive conflict resolution first-hand.

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170. *Id.*

171. *Id.*

172. *See supra* Section II.

173. Kaufer, Noll, & Mayer, *supra* note 21, at 190.

174. *Id.* at 194.

175. *Id.* at 195.

176. *Id.* at 197.

177. *See supra* Section II.

178. Doyle, *supra* note 70, at 189.

179. *Id.* at 191–92.

180. *See supra* Section IV(A)(1).

181. Doyle, *supra* note 70, at 189.

Furthermore, since peacemaking circles involve the community, prison peacemaking circles have the unique potential to bring together prison gangs in a non-violent forum to discuss the root causes of the conflicts and the shared prison experience. In addition to reducing the negative impact of inner-prison conflict and inadequate resolution practices,<sup>182</sup> peacemaking circles have the added potential of revealing what role the greater prison community plays in disposing of the harm and how violence can be minimized within the inmate community.<sup>183</sup> Again, such processes may not be applicable in every situation,<sup>184</sup> but they may help address the underlying causes of prison conflicts on a holistic, community level.

Implementation of prisoner-facilitated VOM and prison peacemaking circles faces institutional resistance due to safety, protocol, or attendance concerns<sup>185</sup> associated with the lenient format of mediation. Fortunately, similar benefits may also be achieved through the more formal process of prison arbitration.<sup>186</sup>

### *B. Prison Arbitration*

Given that arbitration is one of the most popular civil conflict resolution processes,<sup>187</sup> inner-prison conflict resolution systems stand to benefit from this area of ADR as well. Prison officials must maintain control, order, and safety in the prison at all times.<sup>188</sup> Arbitration is known for being efficient and speedy,<sup>189</sup> and it has more structure and formality than mediation.<sup>190</sup> Thus, arbitration can be used in instances where either the inmate or the correctional facility wants a more formalized and “legitimate” process of resolving disputes. Further, inmates often question the impartiality of the processes that led them to prison,<sup>191</sup> so employing a conflict resolution system with a heightened level of formality will do more to project fairness and restore trust.

To provide its full benefits, prison arbitration should be an option to the parties before they are punished or forced into isolation. Prison arbitration should also have standard rules and procedures both parties are aware of before deciding to participate. For example, the arbitration would most likely allow for witnesses to confidentially testify about what they may have heard or observed before the conflict. Prison arbitration rules would most likely not, however, allow for any “formal” discovery, as that would be almost impossible within the walls of facility. The “arbitrator” in this context would need to be a panel composed of at least one current or former inmate and one neutral third party from outside the prison. The panel’s decision as to an applicable resolution would be binding, but panels should focus on rehabilitation and favor solutions that address the root cause of the conflict, not solutions that are primarily punitive in nature (like those often imposed under

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182. See *supra* Section II(A).

183. Doyle, *supra* note 70, at 188.

184. See *supra* Section IV(A)(1).

185. See *The Prison Meditation Movement & the Current State of Mindfulness-Based Programming for Prisoners*, MINDFUL JUSTICE (2015), <https://mindfuljustice.org/wp-content/uploads/2015/11/Prison-MeditationMaull.pdf>.

186. TRYNIECKI, *supra* note 73, at § 43:2.

187. *Id.* at § 44:1.

188. See *infra* Section III.

189. See TRYNIECKI, *supra* note 73, at § 44:1.

190. *Id.* at § 43:2.

191. Kaufer, Noll, & Mayer, *supra* note 21, at 194.



current conflict resolution programs).<sup>192</sup> The arbitration panel could even require the parties to participate in a prison mediation process like those described above, which would directly facilitate rehabilitation and deterrence.<sup>193</sup> Lastly, the arbitration panel's decision has to at least be held to the same Due Process standard of "atypical and significant hardship"<sup>194</sup> that current prison discipline systems are held to.<sup>195</sup>

Applying arbitration to the criminal justice system is not a novel concept.<sup>196</sup> Inner-prison arbitration views conflicts as resolvable with the imposition of community sanctions based in rehabilitation and reconciliation, not solely punishment.

## V. CONCLUSION

Prison conflicts present several problems for American correctional institutions and the people processed through them. Prison conflicts are often violent, result in long-lasting negative impacts on victims, and continue to diminish the rehabilitative and integrative goals of the justice system. Unfortunately, the conflict resolution systems currently in place to address prison conflicts may be doing more harm than good. These systems, which usually result in punishment through isolation and removal of privileges, fail to teach inmates how to resolve conflicts and may have adverse effects on their mental health. To truly begin breaking the cycle, prisons should follow the trend of the criminal justice system by implementing more ADR-centered conflict resolution processes. While these new systems could take many different forms, two of the most impactful and effective options revolve around mediation and arbitration. Particularly, prisons should implement some form of prisoner-facilitated victim-offender mediation, prisoner peacemaking circles, or panel arbitration. These programs, once implemented, will likely bring about similar positive results as mediation and arbitration programs implemented outside of prison.

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192. *See supra* Section III.

193. *See supra* Section III(A).

194. *BERGE, supra* note 48, at 543; *see also* *Sandin v. Connor*, 515 U.S. 472, 475 (1995). *See supra* Section II(C).

195. *BERGE, supra* note 48, at 543.

196. *Greacen, supra* note 134; *see also* Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U. L. REV. 17 (1979).

